

## Revisiting Payment Claims and Payment Responses – When to Serve and What to Include

The Court of Appeal has provided valuable guidance on the adjudication process under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the “SOPA”), particularly relating to the service of payment claims and the importance of raising timely objections to payment claims (if any) in payment responses: *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4.

### Our Comments

In a significant decision for the building and construction industry, the Court of Appeal has addressed a number of critical and practical issues concerning the service of, and the raising of objections to, payment claims under the SOPA.

Key takeaways include the following:

- If the parties’ contract stipulates a date on which a payment claim is to be served, service ought to be made on that date, and not before. However, if that date falls on a Sunday or a public holiday, the payment claim may be served on the following day (provided it is not a Sunday or a public holiday).
- If the respondent considers the payment claim or its service invalid and wishes to raise objections, he must file a payment response containing the objections within the timelines prescribed under the SOPA. If the respondent fails to do so, he is precluded from relying on those objections before the adjudicator or the court.
- An adjudicator has the power to decide matters which go towards his jurisdiction, including challenges to his substantive

jurisdiction as well as challenges to jurisdiction based on appointment.

This update takes a look at the Court of Appeal’s decision.

### Background

The respondent (who is the main contractor) engaged the appellant sub-contractor to carry out structural works in the construction of a nursing home.

Pursuant to clause 59 of the parties’ contract, the sub-contractor was required to serve a payment claim in accordance with Appendix 1 of the contract which provided that the “[t]imes for submitting progress claims” was on the “20th day of each calendar month”.

As the 20th day of November 2016 fell on a Sunday, the sub-contractor considered that it was not feasible to serve a payment claim that day because the payment claim (the “**Payment Claim**”) was voluminous and the main contractor’s office was closed. The sub-contractor therefore served the Payment Claim two days earlier, i.e. on Friday, 18 November 2016 but post-dated the Payment Claim as 20 November 2016.

The main contractor did not issue any payment response.

When the sub-contractor commenced adjudication under the SOPA, the main contractor challenged the validity of the Payment Claim on the basis that it had not been served on 20 November 2016.

The adjudicator rejected the main contractor’s argument and issued the adjudication determination (the “**AD**”) in favour of the sub-

contractor, who sought and obtained leave to enforce the AD.

The main contractor applied to the High Court to set aside both the AD and the order granting leave to enforce.

### The High Court's Decision

Ruling in favour of the main contractor, the High Court Judge set aside the AD on the ground that the Payment Claim had not been served on time and was invalid.

He held that pursuant to Section 10(2)(a) of the SOPA, a payment claim must be served "at such time as specified in or determined in accordance with the terms of the contract". He also held that on a true construction of clause 59 read with Appendix 1 of the parties' contract, the sub-contractor was entitled to serve a payment claim only on the 20th of each month and not on any other day, "neither sooner nor later".

He also found that the main contractor had not waived its right to object to the (allegedly) invalid service of the Payment Claim by failing to file a payment response.

As a result, he found that the adjudicator had no jurisdiction to make the award in favour of the sub-contractor since Section 10(2)(a) was a mandatory provision and its breach invalidated the substantive basis of the adjudicator's jurisdiction and rendered the AD invalid.

The sub-contractor appealed against the High Court decision.

### The Court of Appeal's Decision

Allowing the appeal, the Court of Appeal held that:

- The Payment Claim was validly served in accordance with the parties' contract and is thus, compliant with Section 10(2)(a); and

- Even if the Payment Claim was not validly served, the main contractor was estopped from objecting to the (purported) invalid service because it failed to raise any objection in a payment response.

The Court also clarified that an adjudicator has the power to decide matters which go towards his jurisdiction.

#### *Validity of Payment Claim*

The Court agreed with the High Court Judge that the parties' contract provided for the service of payment claims on the 20<sup>th</sup> day of each calendar month. This meant that service had to be effected *on* (and not *by*) that date.

Notwithstanding the above, the Court ruled that the Payment Claim was validly served and that the sub-contractor had adopted a practical and sensible way of complying with the parties' contract:

- First, the sub-contractor had a valid reason for effecting service of the Payment Claim before 20 November 2016 given that the stipulated date fell on a Sunday and it was not disputed that the main contractor's office was closed on Sundays.
- Second, there could not have been any confusion as to the Payment Claim's operative date as it was correctly dated 20 November 2016, i.e. the day provided in clause 59 read with Appendix 1. As such, it was apparent to the main contractor that the sub-contractor meant for the Payment Claim to be operative, and treated as being served, only on 20 November 2016 and not before.

In the circumstances, the Court held that the sub-contractor did comply with the parties' contract as to the service of the Payment Claim and correspondingly also with Section 10(2)(a).

As guidance for future cases, the Court also highlighted that, under Section 50(c) of the Interpretation Act (Cap 1, 2002 Rev Ed),

obligations to be performed on a Sunday or a public holiday may be performed on the next day that is not a Sunday or a public holiday. To this end, the Court indicated that it would have held that the Payment Claim had been validly served if it had been served on Monday, 21 November 2016.

### *Forgoing of right to object to invalid service of Payment Claim*

The Court observed that, even if the Payment Claim had not been validly served (which was not the case), the main contractor was estopped from objecting to the Payment Claim's invalid service before both the adjudicator and the courts.

The Court found that the main contractor's failure to file a payment response constituted an unequivocal representation to the sub-contractor that it would not raise any objection to the Payment Claim (whether as to jurisdiction or as to the merits), and that the sub-contractor had relied on that representation by omitting to re-file a payment claim.

The Court's reasoning included the following salient points:

- When a claimant serves an invalid payment claim under the SOPA, the respondent has the power, and is entitled, to object to that claim through a payment response.
- The time by which a claimant would reasonably expect the respondent to raise the objection (after which the respondent forgoes his right to do so) is the time by which the respondent is to file his payment response.
- If the respondent exercises his power to raise the objection in a payment response, he establishes for himself the right to raise that objection before a tribunal or a court as a ground for not having to make payment to the claimant.
- However, if the respondent communicates his intention to forbear to exercise his right to

object to the payment claim's validity, the claimant might in reliance on that communication, omit to re-file a payment claim which rectifies the filed payment claim's defect, if any. If the respondent later attempts to challenge the validity of the filed payment claim, the claimant might by then (to his detriment) have missed the opportunity to re-file a rectified payment claim. In fact, the claimant might have decided not to re-file its claim because the respondent had acted consistently with the position that its earlier payment claim was valid. In such a case, the respondent may be estopped from objecting to the payment claim's validity.

- Thus, if the respondent elects to not exercise that power by failing to file a payment response containing the objection, he will not have any right to rely on that objection before a tribunal or court. In other words, he has lost the opportunity to establish that right by the time the payment response should have been filed, and will be subject to the default obligation to pay under the payment claim if no other form of objection has been raised.

The Court further pointed out that the scheme of the Act and Section 15(3)(a) of the SOPA impose on a respondent a duty to speak or respond which includes setting out in full his reasons for withholding payment so that the claimant is not caught by surprise at the adjudication. Section 15(3)(a) restricts the issues which can be raised before an adjudicator to the issues stated in the payment response provided by the respondent to the claimant. Thus, if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response and if he chooses not to do so, he may be regarded as having waived his right to make that objection or as having been estopped from doing so. This accords with the SOPA's purpose of facilitating expeditious dispute resolution.

### *Adjudicator's power to rule on matters which go towards his jurisdiction*

The Court also affirmed the view expressed in its earlier decision in *Grouteam v UES Holdings Pte Ltd* [2016] 5 SLR 1011 that an adjudicator has the power to decide matters which go towards his jurisdiction. This includes both challenges to his substantive jurisdiction as well as challenges to jurisdiction based on appointment.

It also highlighted that there can be no *a priori* exclusion of an adjudicator's power to rule on challenges to his jurisdiction or on the breach of mandatory provisions. In fact, Section 17(3)(h) of the SOPA provides that an adjudicator must consider "any other matter that the adjudicator reasonably considers to be relevant to the adjudication". On a purposive reading, Section 17(3)(h) is sufficiently wide to empower adjudicators to rule on jurisdictional challenges of any nature, including challenges to his jurisdiction by virtue of his appointment.

On payment claims specifically, the Court observed that Section 17(3)(c) of the SOPA must be read as conferring on an adjudicator the power to decide, among other things, whether a payment claim is valid or has been validly served:

- Section 17(3)(c) expressly gives an adjudicator the power, in determining an

adjudication application, to consider the payment claim which initiated the process leading to the adjudication. In turn, he is entitled to consider both the validity and the validity of service of a payment claim.

- This view of Section 17(3)(c) is consistent with and advances the legislative purpose of the SOPA, which is to facilitate cash flow in the building and construction industry through a speedy and efficient resolution of payment disputes. Such an approach is also in line with the holding that objections to jurisdiction and breaches of mandatory provisions should be raised expeditiously and that adjudicators should therefore be able to consider and rule on such objections. In any case, their determination of such issues remains open to review by the court, which has the power to decide them finally and conclusively.

In reaching this conclusion, the Court departed from the reasoning in its earlier decision in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401. The Court also stated that earlier High Court decisions premised on an adjudicator's inability to rule on challenges to his jurisdiction should no longer be followed.

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